

NO. 48933-3-II

**IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON,**

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

AARON TROTTER,

Appellant.

BRIEF OF RESPONDENT

**THOMAS A. LADOUCEUR
W.S.B.A #19963
Chief Criminal Deputy Prosecutor
for Respondent**

**Hall of Justice
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I. RESPONSE TO ASSIGNMENT OF ERRORError! Bookmark not defined.

1. The Washington pattern jury instruction 4.01 (hereinafter WPIC) on reasonable doubt given in this case is not unconstitutional.

II. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

1. Did the trial court err in giving WPIC 4.01 on reasonable doubt?

III. STATEMENT OF THE CASE

As part of its jury instructions the court gave WPIC 4.01, which read,

"The defendant has entered a plea of not guilty. That plea puts in issue every element of the crime charged. The State is the plaintiff and has the burden of proving each element of the crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists as to these elements.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration,

you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt."

IV. ARGUMENTS

1. WPIC 4.01 IS NOT UNCONSTITUTIONAL. THE TRIAL COURT DID NOT ERR IN GIVING IT.

Our courts have recently and repeatedly held that this jury instruction is proper. In *State v. Beeson*, 191 Wash. App. 1024 (2015), ¹the defendant made the exact same argument as here. The court rejected the argument, writing,

"Beeson contends that the instruction defining reasonable doubt as a doubt "for which a reason exists" was constitutionally deficient because it required the jury to articulate a reason for having a reasonable doubt. Relying on *State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012), Beeson also argues that the instruction resembles improper "fill in the blank" arguments that impermissibly shift the burden of proof and may constitute prosecutorial misconduct.

Beeson concedes that the trial court's instruction mirrors WPIC 4.01 and that our Supreme Court has directed trial courts to use WPIC 4.01 to instruct juries on the burden of proof and the definition of reasonable doubt. *State v. Bennett*, 161 Wn.2d 303, 318, 165 P.3d 1241 (2007); *see also State v. Castillo*, 150 Wn.App. 466, 469, 208 P.3d 1201

¹ *State v. Beeson* is an unpublished opinion filed in 2015. Unpublished opinions of the Court of Appeals filed on or after March 1, 2013, may be cited as non-binding authorities, if identified as such by the citing party, and may be accorded such persuasive value as the court deems appropriate. GR 14.1

(2009). In *State v. Kalebaugh*, 183 Wn.2d 578, 586, 355 P.3d 253 (2015) our Supreme Court recently reaffirmed that WPIC 4.01 is “the correct legal instruction on reasonable doubt....” After correctly instructing the jury during preliminary remarks that reasonable doubt was “a doubt for which a reason exists,” the trial judge in *Kalebaugh* paraphrased the explanation as “a doubt for which a reason *can be given*.” *Kalebaugh*, 183 Wn.2d at 585. In concluding that the error in the trial judge’s “offhand explanation of reasonable doubt” was harmless beyond a reasonable doubt, the court rejected any suggestion that WPIC 4.01 required the jury to articulate a reason for having a reasonable doubt or was akin to an improper “fill in the blank” argument. *Kalebaugh*, 183 Wn.2d at 585, 586 (“We do not agree that the judge’s effort to explain reasonable doubt was a directive to convict unless a reason was given or akin to the “fill in the blank” approach that we held improper in *State v. Emery*.”); *See also State v. Thompson*, 13 Wn.App. 1, 4–5, 533 P.2d 395 (1975) (the phrase “a doubt for which a reason exists” does not direct the jury “to assign a reason for their doubt”). Beeson’s challenge to WPIC 4.01 must be directed to our Supreme Court.

WPIC 4.01 has been approved by several courts. *See State v. Bennett*, 161 Wn.2d 303, 165 P.3d 1241 (2007); *State v. Pirtle*, 127 Wn.2d 628, 904 P.2d 245 (1995); *State v. Lane*, 56 Wn. App. 286, 786 P.2d 277 (1989); *State v. Mabry*, 51 Wn. App. 24, 751 P.2d 882 (1988). Furthermore, the Washington Supreme Court has required trial courts of this State to use WPIC 4.01 until a better instruction is approved. *Bennett*, 161 Wn.2d at 318. Because there has been no other instruction approved since *Bennett*, the trial court in this case was required to use WPIC 4.01. There is no

constitutional violation from an instruction that is a correct statement of the law.

Again, in *State v. Balderas-Lopez*, 195 Wash. App. 1032 (2016),² the court approved WPIC 4.01. There, the trial court instructed the jury on reasonable doubt consistent with WPIC 4.01. Balderas-Lopez argued the instruction was unconstitutional because it misstated the burden of proof and undermined the presumption of innocence. *State v. Balderas-Lopez*, 195 Wash. App. 1032 (2016).

The *Balderas-Lopez* court rejected the argument, writing, "in *In State v. Bennett*, 161 Wn.2d 303, 318, 165 P.3d 1241 (2007), our Supreme Court mandated that the challenged instruction be given in all cases. The propriety of this instruction was reaffirmed in *State v. Kalebaugh*, 183 Wn.2d 578, 585-86, 355 P.3d 253 (2015). We have recognized this controlling authority. *State v. Lizarraga*, 191 Wn. App. 530, 364 P.3d 810 (2015), review denied, 185 Wn.2d 1022 (2016). The trial court did not err by doing the same."

In *State v. Pirtle*, 127 Wash. 2d 628, 657, 904 P.2d 245, 262 (1995), the trial court gave the following instruction:

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt

² *State v. Balderas-Lopez* is an unpublished opinion filed in 2016.

as would exist in the mind of a reasonable person *after fully, fairly and carefully considering all of the evidence or lack of evidence*. If, *after such consideration*[,] you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt. If, *after such consideration* [,] you do not have an abiding belief in the truth of the charge, you are not satisfied beyond a reasonable doubt.

Although the issue in *Pirtle* was the propriety of the *last* statement – “If, after such consideration [,] you do not have an abiding belief in the truth of the charge, you are not satisfied beyond a reasonable doubt,” the court wrote, “Without the last sentence, the jury instruction here follows WPIC 4.01, which previously has passed constitutional muster. The addition of the last sentence does not diminish the definition of reasonable doubt given in the first two sentences, but neither does it add anything of substance to WPIC 4.01. WPIC 4.01 adequately defines reasonable doubt. Addition of the last sentence was unnecessary but was not an error. *Pirtle*, at 658.

2. APPEAL COSTS

The state will not seek appellate costs.

V. CONCLUSION

The defendant's conviction for Assault 2 should be affirmed as the reasonable doubt jury instruction was proper. The appeal should be denied.

The state agrees that it would be proper not to seek appellate costs.

Respectfully submitted this 27 day of December, 2016.

By:



TOM LADOUCEUR, WSBA #19963
CHIEF CRIMINAL DEPUTY
PROSECUTING ATTORNEY

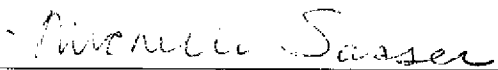
CERTIFICATE OF SERVICE

Michelle Sasser, certifies that opposing counsel was served electronically via the Division II portal:

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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on December 27th, 2016.



Michelle Sasser

COWLITZ COUNTY PROSECUTOR

December 27, 2016 - 2:09 PM

Transmittal Letter

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